BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION OF COURTS BELOW.

See R. 84 (52). Richard J. Hopkins, District Judge. Circuit Court of Appeals, Tenth Circuit, delivered by Judge Bratton.

JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code (28 U.S.C.A. 344a). Appellant has been denied his rights under the Railway Labor Act of 1926 and 1934, and will be denied his pension rights unless he is reinstated in the service of the C. B. & Q. R. R. Co. Appellant was not listed as an employee in August, 1935, the date of the approval of the Pension Act. At the age of 60 appellant is entitled to a pension of $70.00 per month. [Note signatures of petition, Employee's Exhibit "T" page 15.] (R. 51, par. 2, E. J. Manion's letter June 1, 1933, R. 55, G. F. Howard's letter April 24, 1933, R. 46, F. L. Enlow's letter October 13, 1932). Lower court's jurisdiction, which also applies to this Court (R. 8, 17 to 19, 77 and 78).

Section 3 (m) of the Railway Labor Act refers to controversy of the parties, Article III, Section 2, Const. U. S. A., authorize suits between citizens of different states. Section 153 (p) provides suits in Appellant's district where a controversy exists.

STATEMENT.

This is an original cause of action, by appropriate motion, for a remand for further proceedings before the National Railroad Adjustment Board, Third Division, at Chicago, Illinois, under Docket TE. 622 of April, 1938, which was dismissed for alleged want of jurisdiction, and for a writ of mandamus, commanding the Board to retain, and exercise jurisdiction and to render a decision upon the merits of the case, as provided by Section 3, (h), (i) and (j) of the Railway Labor Act as amended June 21, 1934.

A partial hearing was held November 12, 1937; carrier was granted permission, over appellant's objection, to file additional evidence; new issues were raised, which appel-

lant was denied the right to reply to. Appellant presented the following affidavit of Mr. Aydelott, which his representatives would not permit filed, i. e., see p. 26, Transcript of Record. Mr. Aydelott's deposition follows, of October 27, 1933, at Omaha, Nebr.:

> Q. Now, do you remember the circumstances of Mr. Howard's discharge?
>
> A. He was discharged for violation of Rule G, of our code.
>
> Q. Were there any other reasons entering his discharge than that?
>
> A. No.
>
> Q. That was the only reason?
>
> A. Yes, sir.

See Stewart Die Casting Corp. v. National L. R. Board, 114 F. (2d), page 856, column 1, i. e.

Petitioner having raised no question concerning the status of such employees either prior to, or at the time of the strike settlement, we conclude it could not do so afterwards.

It has been customary for the Third Division to grant a second hearing, and sometimes a third. A second hearing was granted in the following cases: Award 136, 137, 138, 139, 133, 275, 280, 291, 292 and 295. See *Ford Motor Co. v. National L. R. Board*, 305 U. S. 364, page 18, appellant's transcript of the printed record, paragraph 4.

See Third Annual Report of National L. R. Board to Congress of the United States, June 30, 1938, page 213, i e. If the Board finds that the agreement will effectuate the policies of the act, it ascertains whether the employer has substantially complied with its terms; if he has not, it issues appropriate orders. See page 29, Transcript of Record, bottom of the page, i. e. First Annual Report, National Mediation Board, June 30, 1935, i. e. page 1: Written Agreements. The relations are to be governed not by the *Arbitrary Will or Whim* of the management or the men, but by written agreements, equally binding on both.

Appellant respectfully requests this Court to direct

Specific Performance of Paragraph F of Rule 30, Telegraphers' Schedule Agreement, i. e. If the final decision decrees that charges against the employee were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee will be returned to former position and paid for all time lost. See page 33, Transcript of Record, for Rule 30, A to G. (There is a mis-print in the record, Rule 30(F), "were sustained" reads "where sustained.")

The amount of damages fixed by contract. See *Acme Mills v. Tanner-Brice Co.*, 112 F. (2d), page 912. The acts complained of being admitted (or proven), and the damages being fixed by contract and properly computed, no jury question was involved, and 16 F. Supp., at page 815, *Cook v. Des Moines Union Ry. Co.*, and *Evans v. Teche Lines*, 112 F. (2d) 934, paragraph (1-2). It is a well established rule in the courts of the United States that where the evidence is so overwhelming on one side as to leave no room for doubt as to what are the facts, the court should give a peremptory instruction. See Appellant's Exhibits A, B, C, D and E, pages 34 to 67, and page 66, for discrimination against three other C. B. & Q. R. R. Co. employees, and Public Policy in Labor Disputes, pages 78 to 83 of the Transcript of Record, 29 U.S.C.A. 102, etc.: *Illinois Cent. R. Co. v. Moore*, 112 F. (2) 965 (10-11). His contract of employment standing thus, and no federal statute providing any limitation, and paragraph (12), the plea that suit may not be filed without recourse to the Adjustment Board is without merit. Permission to go to the Adjustment Board does not exclude direct recourse to the courts. This is confirmed in *Cook v. Des Moines R. Co.*, 16 F. Supp., page 810. In the case *Armour v. Miller*, 91 F. (2d), page 526, bottom of column 1, i. e. Where a suit is strictly *in personam*, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues may be tried and determined; this does not lead to a conflict of authority. *Stanton v. Embrey*, 93 F. (2d) 548, 23 L. Ed. 983. A federal court that takes jurisdiction of a cause takes jurisdiction for all purposes.

SPECIFICATIONS OF POINTS TO BE RELIED UPON AND INTENDED TO BE URGED BY APPELLANT.

1. The Railway Labor Act, Section 2, Eighth, and Section 2, Tenth, i. e. "The willful failure of any carrier, its officers, or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer or agent shall wilfully fail or refuse to comply with the terms of said paragraphs of this section shall constitute a separate offense." The above sections are made a part of each rail employee's labor contract.

2. In the case, *National L. R. Board v. Ford Motor Co.*, 114 F. (2d), page 912, column 1, i. e. There is at least substantial evidence of the direct intimidation of Llewellyn, an employee who attempted to distribute leaflets near gate 1, and it has been held that one instance is enough to justify an injunction. *Nat'l L. R. Board v. Remington R., Inc.*, 2 Circ., 94 F. (2d) 862, cert. denied, 304 U. S. 576, and at page 915 (114 F. (2d)), paragraph (18), i. e.

3. For it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person.

4. Appellant was created a right and privilege in the passage of the Railway Labor Act, 1926, and as amended June 21, 1934, which was authorized by Article VI, Const. U. S. A. Please see page 9, Transcript of the Record, paragraph 3. About two years ago I complained to the attorney general about a violation of the law. No one has denied that there was not a violation of the law, which was authorized by Art. VI, Const. U. S. of A.

5. It is costing appellant between $400.00 and $600.00 to maintain this cause of action. Why? If equal protection of the law applies to all, why should it be necessary to bring a mandamus to compel this board to do the very thing the law says they shall do? In the case, *Vaughan v.*

Winston Co., 83 F. (2d) 370 (C. C. A. 10), he (Judge McDermitt) said: "Whether a statutory requirement is mandatory in the sense that failure to comply therewith vitiates the action taken, or directory, can only be determined by ascertaining the legislative intent. If a requirement is so essential a part of the plan that the legislative intent would be frustrated by a non-compliance, then it would be mandatory."

6. There is no question but what Section 3 (h), (i) and (j), were intended to be mandatory, likewise Section 2 Eighth, and Section 2 Tenth, were intended to be mandatory.

7. In May, 1936, F. F. Cowley, member of the Third Division, made a speech to a labor group at New Orleans, La. This speech was published in a monthly magazine in June, 1936, the Railroad Telegrapher, published at St. Louis, Mo. At page 419, I quote: "At the outset of the set-up of our board, the labor members endeavored to have as one of the rules written into our rules of procedure one that every case, every submission, that came to the division, must have the approval of the chief executive of the respective organization. The carrier members would not go along with that rule, and, as a result, in order to secure an agreement, we had to forego the writing of that rule into the rules of procedure. However, each and every case that has come before our board and been acted upon has been those that have come through the chief executive of the respective organizations and had their approval before being acted upon by the board. That is most important, Brothers. In order to have a case docketed with the board, it requires a majority vote of the membership of the board. In other words, it requires six votes out of ten, and a case cannot be docketed unless one labor member votes with the carrier members, the result that in no instance to date has any case been docketed and heard by the board unless it has been first approved by the chief executive of the organization."

8. And at page 421, same magazine, i. e. Discipline Cases:

> "The carriers, as you know, in the past, have strenuously opposed our having anything to do with the matter of discipline. They have said steadfastly that discipline is a major prerogative and the employees have nothing to say about it, regardless of the fact that the carriers—of course, carrier representatives are human beings the same as the rest of us, and make errors just the same, and perhaps oftener than some of us—but unfortunately, many of them are not ready and willing to admit that, and they have insisted in the past that they should have the right and they alone should have to right to apply discipline and that the employee should have nothing to say about it."

This accounts for the reason for appellant's failure to obtain a hearing, or a transcript of the evidence used against him.

Another thing that puzzles appellant, there has been no denial of a violation of the Railway Labor Act by the Third Division in denying individual rail employees to present their cases to the board for adjudication, including appellant on July 5, 1937.

9. But why should the Federal Government furnish a lawyer (the U. S. Attorney) to defend a violation of the law and deprive some rail employee that is not able to stand the expense of prosecuting his case to endeavor to get the very thing the law says he is entitled to without any such action? Is that what they call equal protection of the law?

10. The Second, Fourth, Sixth and Tenth Circuit Courts of Appeals have held that a refusal on the part of an employer to enter into a signed contract with representatives of employees, embodying a term which may be agreed upon, constitutes a refusal to bargain. See *Consolidated Oil Co. v. National L. R. Board,* 113 F. (2d) 473, C. C. A. 10 C; *Southern Power Co. v. National L. R. Board,* 111 F. (2d) 539, C. C. A. 10 C; 110 F. (2d) 148, C. C. A. 2 C; *N. L. R. B. v. Highland Park Mfg. Co.,* 111 F. (2d) 291 (C. C. A. 4); *H. J. Heinz v. N. L. Board,* 61 S. Ct. 320, af-

firming 110 F. (2d) 843 (C. C. A. 6); and *Bethlehem S. B. Cpn. v. N. L. Board,* 114 F. (2d) 930 (C. C. A. 1), cert. dismissed January 13, 1941; and *Wilson & Co. v. Board,* 114 F. (2d) 759 (C. C. A. 8).

The above holding, of course, is equivalent to the enforcement of a contract that may be in effect, for an unfair labor practice, or a discriminatory discharge. See *Nord v. Griffin,* 86 F. (2d) at page 484, i. e. In *Ochoa v. Hernandez y Morales,* 230 U. S. 139; 33 S. Ct. 1033, the Supreme Court said: "Whatever else may be uncertain about the definition of the term 'due process of law' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

11. The fact that appellant has been out of employment since his dismissal, it is quite impossible for a man inexperienced in other lines than railroad work, and railroads at this day and age of the world will not employ a man over forty. The fact appellant was employed by the C. B. & Q. R. Co. at the age of 16, dismissed at the age of 49, appellant is practically barred from other employment, i. e. As stated, page 88, Third Annual Report, National Labor Relations Board, i. e. "A minor infraction, followed by a serious penalty, like discharge, also raises an inference that the claimed reason is only a pretext; as where the employer claimed he discharged the employee for resuming work seven minutes late, i. e., four minutes after the period of grace; though the employer's practice with respect to other employees had been to use warnings and lighter penalties before discharging," i. e. See page 53, Transcript of Record, one agent given 30 days in jail, $350.00 fine; one conductor suspended for 30 days, i. e., then reinstated; above agent served no time, page 50, paragraph 4; one employee, agent-telegrapher, reinstated *four* times; last time required to sign a pledge, i. e., *"Booze no more."*

12. I now wish to call the Court's attention to Mr. L. E. Caldwell's deposition of July 30, 1934. He testified under oath, page 38, Transcript of Record:

Q. This is all the information you have that you have given?

A. As far as I know, to the best of my knowledge.

Q. This is all you know about this Maxine Fritz or whatever her name is, what you have given?

A. Yes.

Q. You made no investigation up to the time of Mr. Howard's discharge other than these documents you have, these statements of police?

A. Yes, sir.

Q. And those are the only things you have for discharging him?

A. Other than absenting himself from duty without permission.

Q. When was that?

A. The following morning.

Q. Was that one of the reasons why you discharged him?

A. Yes (See page 28, bottom paragraph, Transcript of Printed Record).

Q. Was that one of the reasons why you discharged him?

A. Yes.

Q. How long was he off duty?

A. Part of the forenoon.

Q. How much time was he off duty?

A. I imagine one and a half or two hours.

Q. Do you know that he was?

A. Not from my personal knowledge (See page 82, Transcript of Record. Railroad politics was responsible for appellant's discharge).

Q. Did you ever have that kind of a report before from Mr. Howard?

A. No, sir.

Q. Now Mr. Caldwell, have you given us all the reasons why he was discharged?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. Do you entertain any ill will toward Mr. Howard?

A. No, sir.

Q. None at all?

A. No, sir.

Regarding Maxine Parks, Mr. Caldwell admits in the questions and answers at the bottom of page 39 and top page 40, Transcript of the Record, that this had no bearing on appellant's dismissal. I had no more to do with Maxine Parks than L. E. Caldwell did. This was answered by affidavit at the hearing before the board. Further answer on this subject is not necessary, inasmuch as this was not one of the charges brought against appellant.

13. Referee Swacker exceeded his authority in the decision of April 7, 1938, i. e. See *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88-91, and the *Jones & Laughlin*, 301 U. S. 1. Mr. Swacker set the decision of the jury aside in the Kansas court action, as well as the decision of the Supreme Court of the United States in *Erie R. Co. v. Tompkins*, 304 U. S. 64. See page 11, Transcript of Record.

14. Special Question No. 1, as filed with the board at Chicago by the C. B. & Q. R. Co., reads as follows (See page 27, paragraph 2, Transcript of Record, on this subject):

"If you find for plaintiff, what amount, if any, do you find or allow for damages *of* loss of seniority rights? (of as italicized should be or).

Please see Exhibit C, page 63, Transcript of Record, for correct reading. See *McNulty v. National Mediation Board*, 18 F. Supp. 506, i. e. The carrier must enter with clean hands before it can invoke the court's equity powers to restrain another, no matter how inequitable that other's conduct may have been, and the case, *Obartuch v. Security M. L. I. Co.*, 114 F. (873), column 2, i. e. Fraud vitiates whatever it touches.

15. *United States v. Hines, pro se*, 103 F. (2d), page 742, i. e. Contract: The purpose was to give him valuable

benefits—the benefits of such reinstatement (top page 743, column 1). This is the very purpose contemplated and included by the contract; otherwise it means nothing. The same applies to appellant's labor contract.

16. *Dismuke pro se v. United States,* 297 U. S. 167. In Dismuke's suit against the United States under the Tucker Act, court held: "Power to administrative officer will not, in absence of a plain command, be deemed to extend to the denial of a right which the statutes create; the question of law was open to review." Referee Swacker's decision illegally deprived appellant of his right under the Railway Labor Act.

When an employee has been denied a hearing, the carrier or anyone else has no way of knowing whether or not he was guilty of any misconduct or otherwise at fault in any way. Such unfair labor practice under the law and appellant's labor contract entitles appellant to reinstatement with pay for all time lost. See *Jones & Laughlin,* 301 U. S. 1; *National L. R. Board v. Freuhauf Trailer Co.,* 301 U. S. 49; *Friedman H. M. C. Co.,* 301 U. S. 58, 301 U. S. 103, 301 U. S. 142, 304 U. S. 333, 303 U. S. 41, 303 U. S. 453, 303 U. S. 54.

17. Page 49, Transcript of Record: Aydelott mentions leniency. This is one way "A Company Dominated Union" have of depriving their employees of their rights. See page 43, Transcript of Record. Enlow's letter to Todd, October 6, 1932. That says nothing about leniency. I wanted a hearing, and demanded it a number of times. Aydelott mentions that I was able to make investments on the outside to my advantage. I challenge that statement, and his source from whom he obtained such information. Page 45, Transcript of Record, Enlow's letter October 7, 1932, to Todd, Enlow states that I own several filling stations. I answered that on the same page. Enlow magnified his statement seven times, the same regarding appellant being pretty well fixed, that also was magnified and enhanced in excess of seven times. My net income since I was dismissed after I paid my taxes (I own no land, except town property valued at about $7,000, which

I collect $40.00 per month rent) has not exceeded $300.00 per annum, and I deny anyone to show anything to the contrary.

ARGUMENT.

An analysis and appraisal of the procedure under the Railway Labor Act as amended June 21, 1934, and the National Labor Relations Act, should be approached through some initial consideration of the purpose of the Acts and their substantive provisions. Procedure of a federal administrative or quasi-judicial agency is a method provided by Congress for the carrying out of a public policy decided upon by Congress. The Congressional policy is set forth as follows: "It is hereby declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. Employees have as clear a right to organize and select their representatives for lawful purposes as the employer has to organize its business and select its officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority."

The substantive provisions of the statutes prevent practices such as the discriminatory discharge, the company-dominated unions, the threat of loss of employment for union activity, espionage, *et cetera* (practices termed by Congress as "unfair labor practices"), and found by Congress, on the basis of experience, so well known, that the Supreme Court said it was a matter of judicial notice, to undermine and destroy the right of collective bargaining (301 U. S. 1).

G. F. Howard, *Plaintiff.*

8/27/41.

Employee's Exhibit "T".

Oberlin, Kansas, October 20th, 1932.

We, the undersigned citizens of Oberlin, Decatur County, Kansas, hereby petition, and request the Chicago, Burlington & Quincy Railroad Company, to reinstate Mr. G. F. Howard as Agent at Oberlin, Kansas.

W. K. Curry, Mayor,
J. C. Nitsch, Councilman,
L. R. McGee, Councilman,
John W. Bivans, Councilman,
R. F. Landau, Councilman,
Glenn F. Hanson, Councilman,
O. F. Loehoefener, Grain and Coal,
Art Comer, Drayman
C. W. Frank, Mgr., Equity Elevator
L. W. Haresnape, Asst. Mgr., Elevator,
L. L. Steinshauer, Mgr. Foster Lbr. Co.,
R. E. Dominy, Asst. Mgr., Foster Lbr. Co.,
J. D. Paddock, Lumber and Coal dealer,
C. G. Robinson, Second-hand store,
H. O. Benton, Pres. Oberlin Nat'l Bank,
Henry Lippelmann, of Benton-Hopkins Inv. Co.
Warner Marvin, Heating and Tin Shop,
John W. Hanson, Hanson Grocery,
W. A. Cook, Pool Hall and Confectionery,
C. A. Zimmerman, Grocery Store,
H. D. Webster, Mgr. Duckwall's Store,
R. S. Clair, Clair Bros Clothing,
J. I. McKenzie, Pool Hall
V. H. Griffith, Furniture and Undertaking,
E. S. Dean, Dean's Clothing Store,
C. E. Carper, Carper's Hardware,
H. L. & V. C. Murphy, Implements, Coal,
Jane Barnard, City Clerk,
Henry Olsen, Owner Oberlin Hotel,
Chas. Votapka, Owner, Northwest Seed House,
A. J. Gierhart, Salesman, Ford Motor Co.,
Ray Dyer, Photographer,
A. E. Weir, Mgr., Weir's Grocery,
E. P. McKenzie, McKenzie's Cafe,
Henry Beardsley, Mgr. Electric Shop,
C. G. Ressler, Mgr. Sweet Shop,
E. R. Woodward, Editor, Oberlin, Times,
Elwood M. Brooks, Cashier, Farmers Nat'l Bank,
Howard Anderson, Mgr. City Cafe,

Ben A. Miller, Kent Service Station,
S. J. O'Toole, Director, Oberlin Nat'l Bank,
Chas. P. Stevenson, Postmaster,
J. H. Fleming, Fleming's Bakery,
Geo. C. White, Trav. Salesman, Norton, Kan.
R. J. Fringer, Confectionery Store,
J. W. Seigenthaler, Electric Shop,
Chas. Jones, of Anderson's Hardware,
F. G. Redman, Lumber and Coal Co.,
C. G. Paddock, Paddock Seed House,
J. D. Hayes, Hayes & Son Hardware,
J. F. Peters, County Attorney,
G. L. Stephens, Sheriff,
W. W. McCartney, County Treasurer,
R. R. Hess, Register of Deeds,
George Nellans, County Clerk,
W. T. Stevenson Drug Co.
Beardsley & Stevenson, Electric Theatre,
J. J. Scott, Pool Hall,
Boyd H. Love, Jeweler,
Glenn Gierhart, Gierhart Music Co.
Jack & Faye Weimer, Oberlin Steam Bakery,
L. J. Smith, Paint & Auto Shop,
E. C. Lyle, Mgr., Safeway Store,
N. C. Gierhart, Mgr., J. C. Penney Co.
Art S. Steele, Retired Banker,
E. E. McGee, Service Tire Shop,
Wm. J. Bowen, Standard Service Station,
E. W. Coldren, Editor, Oberlin Herald,
C. J. Casteel, Barber,
Thos. Bowling, Barber,
John M. Bremer, Atty at Law.

The original petition was sent to J. H. Aydelott by E. F. Todd during November, 1932, and Aydelott refused to return it to me.

G. F. Howard.

I hereby certify the above to be a true copy of the original.

G. F. Howard.

Form 12—Specific Performance of Contract; Federal Rules Practice, page 134.

While this cause was for a remand for further proceedings, and a request for a writ of mandamus before the board, under the ruling, *Illinois Central R. Co. v. Moore,* 112 F. (2d) 959, and *Cook v. Des Moines U. R. Co.* 16 F. Supp. 810, this would be lost motion; any action by the board would have to be approved by the court, and under 91 F. (2d), page 525, paragraph (10), *Armour v. Miller,* it is, of course, well settled that the writ of mandamus should never issue if any other remedy exists which is fully adequate.

Wherefore, plaintiff demands: (1) That the Chicago, Burlington and Quincy Railroad Company, a corporation, be required specifically to perform said Labor Agreement. See page 33, Transcript of Record, Rule 30(F), and that appellant be allowed the cost in this action. Rules adopted by the Third Division are in conflict with Section 3 (u) of the Act. (2) Or in lieu thereof, that the writ of mandamus issue commanding the board to retain and exercise jurisdiction of the case and render a decision upon the merits. See *Yearsley v. W. A. Ross Const. Co.,* 60 S. Ct. 413, regarding the cost.

G. F. HOWARD, *Appellant.*

Oberlin, Kans., 5/4/42.